IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-7314

SUN OIL COMPANY, GENERAL CRUDE OIL COMPANY, M. H. MARR, CONTINENTAL OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PHILADELPHIA GAS WORKS DIVISION OF UGI CORPORATION, TEXAS EASTERN TRANSMISSION CORPORATION, FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PHILADELPHIA GAS WORKS DIVISION OF UGI CORPORATION,
TEXAS EASTERN TRANSMISSION CORPORATION,
FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sun Oil Company, General Crude Oil Company, M. H. Marr and Continental Oil Company (Petitioners) petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered March 25, 1974 and its order denying rehearing and supplemental opinion entered August 27, 1975, in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, pp. A1-A135), its order amending the initial opinion (App. B, *infra*, pp. B1-B3), and its supplemental opinion on rehearing (App. C, *infra*, pp. C1-C22) are not yet reported. The initial opinion (No. 565) of the Federal Power Commission (App. F, *infra*, pp. F1-F103), its opinion (No.

565-A) on rehearing (App. G, *infra,* pp. G1-G48) and its order denying rehearing of opinion No. 565-A (App. H, *infra,* pp. H1-H7) are reported at 42 FPC 376, 44 FPC 1079 and 44 FPC 1471.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1974 (App. D, *infra*, pp. D1-D4) and petitions for rehearing were denied on August 27, 1975 (App. E, *infra,* pp. E1-E2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Did the court below act in conflict with decisions of the Fifth Circuit and this Court by ordering the Federal Power Commission to prescribe refunds by sellers of Southern Louisiana gas based upon an 18.5 cent per Mcf area rate contained in Commission Opinion No. 546 (SoLa I) which never became effective or final and was withdrawn *ab initio* by the Commission in its Opinion No. 598 (SoLa II) which was affirmed in *Placid Oil Company* v. *Federal Power Commission,* 483 F. 2d 880 (5th Cir. 1973) and *Mobil Oil Corporation* v. *Federal Power Commission,* 417 U.S. 283 (1974).

2. Did the court below err in holding that the Commission's power under Section 7(e) of the Natural Gas Act, 15 U.S.C. 717f(e), to attach reasonable terms and conditions to certificates of public convenience and necessity is so circumscribed by this Court's *Mobile-Sierra* rule as to

[1] Because of their length, the Appendices to this Petition are presented in a separate volume which accompanies this Petition.

preclude the Commission from permitting Petitioners to collect payment for all gas produced over the life of the gas reserves as an essential part of the Commission's conventionalization of the sale of leases here involved.

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717W, provides in pertinent part, as follows:

> Section 7(e), 15 U.S.C. 717f(e);
>
> • • • [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the • • • sale • • • covered by the application, if it is found • • • that the proposed • • • sale, • • • to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

A. Background

This case arises from Petitioners' sale of leasehold interests in the Rayne Field, Southern Louisiana to an interstate natural gas pipeline company, Texas Eastern Transmission Corporation (Texas Eastern). Initially, the Federal Power Commission (Commission) certificated Texas Eastern to build facilities attaching the Rayne Field leases to its transmission system, but disclaimed jurisdiction over the sale of the leases.[2] On appeal, this Commission action was set aside and remanded. However, the reviewing court

[2] *Texas Eastern Transmission Corp.,* 21 FPC 860, 864 (1959).

did not disturb the Commission's disclaimer of jurisdiction.[3] On remand, the Commission for the first time asserted jurisdiction over Petitioners' sale of leases.[4] In light of the Commission's initial disclaimer of jurisdiction, Petitioners as sellers of the Rayne Field leases had not until then been parties to the proceedings relating to Texas Eastern's acquisition of the leases.[5]

Petitioners appealed the Commission's assertion of jurisdiction and obtained its reversal at the court of appeals level.[6] This Court reversed the Fifth Circuit and upheld the Commission's jurisdiction over the sale of gas arising from the lease sale, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965). This Court noted that "the propriety of the Commission's disposition of the case following its assertion of jurisdiction" was not before it and that only the jurisdictional question was being decided, *id.* at 399.

As a result of this Court's jurisdictional holding, each Petitioner filed an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), seeking Commission authorization of the sale of gas effected by its conveyance of leases to Texas Eastern. As discussed *infra*, the Commission issued certificates to Petitioners subject to conditions which were attacked by Petitioners and other

[3] *Public Service Commission of the State of New York* v. *Federal Power Commission*, 287 F.2d 143, 145 (D.C. Cir. 1960).

[4] *Texas Eastern Transmission Corp.*, 29 FPC 249, 253 (1963).

[5] In reliance upon the Commission's disclaimer of jurisdiction, Petitioners consummated the sale of the leases by conveying them to Texas Eastern on July 27, 1959.

[6] *M. H. Marr* v. *Federal Power Commission*, 336 F.2d 320, 325-26 (5th Cir. 1964).

parties before the court of appeals below.[7] The court below has affirmed the Commission in part but substantially altered to Petitioners' detriment the conditions imposed by the Commission upon the certificates.

This petition is addressed to the disposition of the court below upon its review of the Commission's opinion and order issuing conditioned certificates to Petitioners.

B. Proceedings Before The Commission

Petitioners sought Commission certificate authorization of the sale of natural gas in accordance with the terms and provisions of the lease sale agreement with Texas Eastern. This agreement provided for the assignment and conveyance of Petitioners' Rayne Field leases in consideration of $134,395,700 consisting of a cash payment of $12,420,500 and the remainder payable by serial notes maturing over a 16-year period. Petitioners also reserved a production payment applicable to the proceeds from the condensate liquids produced by Texas Eastern until 613,406,770 Mcf of natural gas had been produced from which Texas Eastern's costs of operating the Field were deducted. Upon termination of the production payment, Texas Eastern would retain the condensate liquid proceeds.

On August 6, 1969, the Commission issued Opinion No. 565 (App. F, *infra*, pp. F1-F103) accepting the hearing examiner's recommendation that the lease sale agreement should be substantially modified so as to make it more comparable to a conventional sale of gas. In implementation of its "conventionalizing" approach, the Commission provided that payments to Petitioners for gas thereafter produced by Texas Eastern from Rayne Field would not exceed

[7] The jurisdiction of the court below was invoked by petitions to review the Commission's action pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

18.5 cents per Mcf[8] (or other applicable area prices determined by it) until the $134,395,700 purchase price had been paid (*id.* at F42). It further directed Petitioners to refund amounts collected from Texas Eastern under the terms of the lease sale agreement which exceeded 20 cents per Mcf[9] for the period prior to October 1, 1968 and 18.5 cents per Mcf thereafter until the date of refund. Through 1967, this refund amounted to $31,449,000 inclusive of interest (*id.* at F26-F27).

Applications for rehearing of Opinion No. 565 were filed by Petitioners and others. On September 29, 1970, the Commission issued Opinion No. 565-A on rehearing (App. G, *infra*, pp. G1-G48). While confirming the "conventionalization" approach adopted in Opinion No. 565, it stated that "the arrangement prescribed in our original opinion and order should be modified so as to bring it closer to a conventional sale" (*id.* at G4).

To accomplish this objective, the Commission modified its original "conventionalization" of the lease sale agreement in two important respects. First, it provided that Petitioners would receive payment from Texas Eastern for the gas produced from the transferred leases until their exhaustion as well as credit for the revenues from the liquids produced. Second, it deferred refunds by Petitioners

[8] Subsequent to the hearing examiner's decision, the Commission had issued its first opinion in the *Southern Louisiana Area Rate Proceeding*, setting forth an area rate of 18.5 cents per Mcf for gas sold pursuant to pre-1961 contracts, Opinion No. 546 issued September 25, 1968 (40 FPC 530). This rate was stayed, never made effective, and was withdrawn by Opinion No. 598 (46 FPC 86).

[9] The 20-cent refund base for the period prior to October 1, 1968 was the "in-line" price determined by the Commission for conventional sales of gas in Southern Louisiana of the same vintage as the sale of the Rayne Field leases (*id.* at F12).

until just and reasonable rates had been finally established for the Southern Louisiana area and provided that such rates, when determined, would apply retrospectively for refund purposes. The Commission found these modifications to be required by the public convenience and necessity (*id.* at G4-G5).

The first modification extending payments to Petitioners for gas and liquids over the life of the transferred leases recognized that although Petitioners would be permitted to recover $134,395,700 under the "conventionalization" arrangement prescribed in Opinion No. 565, that amount would be of substantially less value because it would be collected over a much longer period than provided by the lease sale agreement. Without this modification, the Commission stated, Petitioners "will not receive the benefit of all the gas and liquids produced by the Field as they would under a conventional contract" (*id.* at G10-G11).

In support of its second modification, *i.e.*, deferral of refunds pending final determination of the Southern Louisiana area rates, the Commission pointed out that as a result of judicial review of its first *Southern Louisiana* Opinion No. 546, the Fifth Circuit confirmed the Commission's authority to modify any part of its *Southern Louisiana* orders "including those affecting revenues from gas already delivered, and to make retrospective as well as prospective adjustments in the public interest" (*id.* at G13).[10] The Commission noted that, as a result, it had

[10] This quoted language paraphrases the following language of the Fifth Circuit in its order of June 16, 1970 on rehearing in *Southern Louisiana Area Rate Cases* (*Austral Oil Co.* v. *FPC*), 444 F. 2d 125, 126-7, involving review of the Commission's Opinion No. 546:

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under Section 19(b)

stayed the effect of its rate orders in Opinion No. 546.[11] In these circumstances, the Commission found that "the public interest precludes our ordering refunds to be paid by the Rayne Field producers at this time" (*id.* at G14). Additionally, the Commission observed that refund deferral would achieve the important objective of affording Petitioners "the same treatment as will be given to all other producers in Southern Louisiana" (*ibid.*). The Commission concluded that the finally determined area rates for Southern Louisiana[12] "should govern the level of payments in this case prior to October 1, 1968, as well as after that date" (*ibid.*).

Applications for rehearing of Opinion No. 565-A were filed by Petitioners and others and denied by the Commission's order issued November 24, 1970 (App. H, *infra,* pp. H1-H7).

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of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so. [emphasis in original]

[11] Order Continuing Stay, issued July 2, 1970, in *Southern Louisiana Area Rate Proceedings,* Docket No. AR61-2, *et al.,* 44 FPC 6.

[12] Final area rates for Southern Louisiana were determined by the Commission's Opinion No. 598, issued July 16, 1971, 46 FPC 86. On review, Opinion No. 598 was affirmed by the Fifth Circuit *sub nom. Placid Oil Co.* v. *FPC,* 483 F.2d 880 (1973) which was thereafter affirmed by this Court *sub nom. Mobil Oil Corp.* v. *FPC,* 417 U.S. 283 (1974). In its affirmance, this Court made clear that the Commission's first *Southern Louisiana* opinion (Opinion No. 546) had never become final "and thus it was within the power of the Commission to reconsider and change it" (*id.* at 312) as it did in Opinion No. 598.

C. The Decision Below

On petitions for review, the court below affirmed the Commission's refusal to unconditionally certificate Petitioners, but reversed the Commission by abrogating certain important conditions which the Commission had attached to the certificates of public convenience and necessity granted to Petitioners. In lieu thereof, the court below substituted its own certificate conditions which it found to be legally required (App. A, *infra,* pp. A1-A135). In a supplemental opinion accompanying its order denying rehearing, the court largely reiterated its reasoning and found no change in its original determination warranted (App. C, *infra,* pp. C1-C22).

While sustaining in principle the Commission's determination to "conventionalize" the lease sale agreement (App. A, *infra,* pp. A32-A48), the court found certain aspects of the Commission's "conventionalization" legally impermissible. In Opinion No. 565-A, the Commission had deferred refunds by Petitioners pending its determination of final area rates for the Southern Louisiana area where the Rayne Field leases are located. For the same reason, the Commission required Petitioners to file a 20-cent rate applicable to future production. The court below held that the Commission was compelled to utilize 18.5 cents as the basis for refunds and for future production and to order immediate refunds by Petitioners (*id.* at pp. A73-A74). The court reasoned that the foregoing was required because in 1968 the Commission had stated 18.5¢ to be the applicable just and reasonable rate for Southern Louisiana gas of the Rayne Field vintage. The court below rejected the Commission's explanation that the 18.5¢ rate had never become final and would be superseded, retrospectively and prospectively, by its final area rate determination which issued on July 16, 1971

as Opinion No. 598, 46 FPC 86. In Opinion No. 565-A, the Commission had expressly stated that its final area rate determination when issued would apply in full to the instant proceeding (App. G, *infra,* p. G14). Nevertheless, the court below found that Opinion No. 598 could not be applied to this proceeding except after August 1, 1971, its effective date (App. A, *infra,* pp. A130-A133).

The court below also abrogated the "conventionalizing" condition imposed by the Commission in Opinion No. 565-A permitting Petitioners to receive payment for the gas produced and credit for the liquid revenues until exhaustion of the transferred leases. The Commission had found this condition to Petitioners' certificates necessary in order to bring the previously prescribed arrangement "closer to a conventional sale" (App. G, *infra,* p. G4). The court below, nevertheless, was of the view that the Commission had not found this condition to be "essential to conventionalization of the lease-sale arrangement" (App. A, *infra,* pp. A68-69). Assuming that the Commission's "conventionalizing" condition increased the $134,395,700 price contained in the lease sale agreement, the court found that the Commission was not empowered to accomplish this result under this Court's *Mobile-Sierra* rule (App. A, *infra,* pp. A64, A67).[13] In lieu of the life-of-reserves condition imposed by the Commission, the court below fashioned its own certificate condition noting that by limiting Texas Eastern's liability to the contract price and simultaneously spreading its discharge over a longer period of time than contemplated by the lease sale agreement, Petitioners would receive less than "the *quid pro quo* for which they contracted" (*id.* at pp. A69-A70). Accordingly, the court directed the Commission

[13] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Company,* 350 U.S. 348 (1956).

to provide for "an increase in Texas Eastern's payments beyond the $134 million contract price by an amount equal to the time value of the money to be paid on the Commission-rearranged payment schedule" (*id.* at p. A71).

REASONS FOR GRANTING THE WRIT

1. Conflict With Decisions Of This Court And Fifth Circuit

The court below directed the Commission to order refunds by Petitioners down to an 18.5 cent per Mcf level, set forth in Commission Opinion No. 546,[14] rather than on the basis of the higher rates ultimately approved for refund purposes for the Southern Louisiana area in Commission Opinion No. 598.[15] This directive is in direct conflict with the decisions of this court[16] and the Court of Appeals for the Fifth Circuit,[17] which determined that Commission Opinion No. 546 never established valid and effective rates for determining producer refunds relating to sales in the Southern Louisiana area.

The history of Southern Louisiana area rate making is long and complex. Following its first efforts to determine producer rates for interstate sales of natural gas on an area basis,[18] the Commission launched the Southern Louisiana area rate proceeding in 1961. By its first opinion, Opinion No. 546 issued September 25, 1968, the Commission

[14] *Southern Louisiana Area Rate Proceeding* (SoLa I), 40 FPC 530 (1968).

[15] *Southern Louisiana Area Rate Proceeding* (SoLa II), 46 FPC 86 (1971).

[16] *Mobil Oil Corporation* v. *Federal Power Commission,* 417 U.S. 283 (1974).

[17] *Placid Oil Company* v. *Federal Power Commission,* 483 F.2d 880 (1973).

[18] *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

purported to set rates for sales of natural gas under contracts made prior to 1961 at 18.5 cents per Mcf. On review, Opinion No. 546 was considered by the Fifth Circuit, which expressed its dissatisfaction with the Commission's efforts in setting rates for the Southern Louisiana area, and "affirmed" Opinion 546, but with clear instructions to the Commission as to its latitude to reconsider the Opinion 546 rates. *Austral Oil Company* v. *Federal Power Commission,* 428 F.2d 407 (5th Cir. 1970). The Commission itself, reflecting its own dissatisfaction with the rates purportedly set by Opinion 546, had already commenced the second round of the Southern Louisiana area rate hearings in 1969, even prior to the Fifth Circuit's decision in *Austral.* On rehearing of its *Austral* decision, the Fifth Circuit emphatically pointed out that its "affirmance" of Opinion 546 did not impair the Commission's ability to alter or modify any of the provisions, particularly refund provisions, of Opinion 546, retrospectively and prospectively.[19]

The rates set forth in Opinion 546 never became effective as to any sales of natural gas in the Southern Louisiana area. The Commission and the Fifth Circuit granted continuing stays of Opinion 546 which rendered it nonoperative and ineffective in all respects from the date of its issuance and it was formally withdrawn in all respects by the Commission's Opinion No. 598, which culminated the Southern Louisiana area rate proceeding. Opinion 598 determined higher rates for natural gas in Southern Louisiana for all applicable time periods as to which Opinion 546 had first been intended to apply. The Commission in Opinion 598 expressly vacated the refund provisions and rate levels for refunds set forth in Opinion 546. Opinion 598 comprehensively covered all Southern Louisiana producer

[19] *Austral Oil Company* v. *Federal Power Commission,* 444 F.2d 125, 126-27 (1970).

refunds for all periods of time from the advent of producer regulation in 1954 and rendered Opinion 546 a nullity in every respect.

The Commission's abrogation and withdrawal of Opinion 546 was expressly considered by the Fifth Circuit in *Placid Oil Company* v. *Federal Power Commission,* 483 F.2d 880 (1973). That court affirmed completely the Commission's action in Opinion 598 aborting Opinion 546 for all purposes. Notwithstanding this decision by the Fifth Circuit, the court below[20] has attempted to resurrect Opinion 546 as the basis for directing the Commission to order refunds by Petitioners.

In petitions for rehearing before the court below, Petitioners pointed out the conflict between the court's initial opinion resurrecting Opinion 546 and the decision of the Fifth Circuit affirming the Commission's repudiation of Opinion 546. Following the petitions for rehearing, but prior to the supplemental opinion below,[21] this Court affirmed in all respects the decision of the Fifth Circuit in *Placid, supra,* which had affirmed the Commission's complete redetermination of Southern Louisiana area rates and refunds in Opinion 598. *Mobil Oil Corporation* v. *Federal Power Commission,* 417 U.S. 283 (1974). Notwithstanding the clear decisions of the Fifth Circuit and this Court in affirming the Commission's total repudiation of Opinion 546 for any purpose, the court below upon rehearing refused to modify its initial opinion thereby creating an irreconcilable conflict between its opinion and the decisions of the Fifth Circuit in *Placid, supra,* and this Court in *Mobil, supra.*

[20] Appendix A, *infra.*

[21] Appendix C, *infra.*

This Court in *Mobil* expressly dealt with the lack of finality of the rate and refund provisions of Opinion 546, and affirmed the Commission's action in Opinion 598 discarding Opinion 546. As the Court stated in *Mobil, supra,* 417 U.S. at 310-312:

> Before reviewing the Court of Appeals' affirmance of the Commission's 1971 order [Opinion 598] for compliance with *Permian's* requirements, we address contentions that challenge the statutory authority of the Commission to adopt the order, rather than the terms of the order itself. The first of these challenges, made by New York and MDG is that the Commission had no statutory authority to change rates and refund obligations fixed in the Commission's 1968 order [Opinion 546] after that order was affirmed by the Court of Appeals in *SoLa I.* MDG brief, at p. 18; New York brief, at p. 15. The argument is that the affirmance was "unqualified" and therefore exhausted the Court of Appeals' powers of review under § 19(b), thus rendering its authorization to the Commission to reopen its 1968 orders without legal effect. But the affirmance of the 1968 order was not "unqualified." Although the Commission could not have reopened the order on its own, see *Montana-Dakota Utilities Co.* v. *Northwest Public Service Co.,* 341 U.S. 246, 254 (1951); *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 618 (1944), the Court of Appeals' opinion on rehearing made it "crystal clear" that despite the form of the court's judgment, the Commission was fully authorized to reopen any part of the 1968 order that seemed appropriate and necessary if evidence as to the future supply problem indicated that this should be done.
>
> The Court of Appeals properly took this step in light of new information, unavailable at the time of the 1968 order, that suggested the possible inadequacy of the 1968 determination, although not necessarily an inadequacy that justified setting aside the order. See *Baldwin* v. *Scott County Milling Co.,* 307 U.S. 478 (1939). Moreover, the 1968 order had not been made

> effective, being continuously stayed until withdrawn in the 1971 order. See 46 F.P.C., at 101. In these circumstances, we cannot say that the action of the Court of Appeals exceeded its powers under § 19(b) "to affirm, modify, or set aside [an] order in whole or in part."
>
> This jurisdiction to review the orders of the Commission is vested in a court with equity powers, *Natural Gas Pipeline Co.* v. *FPC,* 128 F.2d 481 (1942), see *Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 373 (1938), and we cannot say that the Court improperly exercised those powers in the circumstances. *Dolcin Corp.* v. *FTC,* 219 F.2d 742, 750-752 (1955). Indeed § 19(b) provides that the Court of Appeals may authorize in proper cases the Commission to take new evidence, upon which the Commission may modify its findings of fact and make recommendations concerning the disposition of its original order. Under the Court of Appeals disposition, the 1968 order was therefore not final and thus it was within the power of the Commission to reconsider and change it. See *United Gas Improvement Co.* v. *Callery Properties,* 382 U.S. 223, 229 (1965). [Footnote omitted]

The Fifth Circuit in *Placid, supra,* also unequivocally held that the Commission's Opinion 546 had no effect and was rendered nugatory by the Commission's subsequent action in Opinion 598. The Fifth Circuit expressly decided that the prior refund determination under the Commission's Opinion 546 had been superseded *ab initio* and rendered for naught by the Commission's Opinion 598, notwithstanding the Fifth Circuit's previous qualified "affirmance" of Opinion 546. That court in *Placid* rejected the argument that the prior refund obligation in Opinion 546 was affirmed and that Opinion 546 was therefore controlling for refund purposes, stating as follows:

> For there [in *Austral*] we categorically rejected the notion that the label 'affirmance' could possibly impair FPC's ability to alter or modify *any* of the provisions, particularly the refund provisions of its SoLa I [Opinion 546] rate scheme if it believed that the exigencies of the gas industry required more effective remedial measures. 483 F.2d at 904.

Thus, the Fifth Circuit in *Placid* and this Court in *Mobil* affirmed the Commission's action in Opinion 598 in setting aside the rates and refunds established under its earlier Opinion 546.

The Commission itself had made eminently clear in Opinion 598 that it was abrogating in all respects, retrospectively as well as prospectively, its earlier Opinion 546. The Commission noted that the Fifth Circuit in *Austral* had specifically directed that the Commission had the authority to change its Opinion 546 rate and refund determinations retrospectively and the Commission took that direction to heart as telling it to use such authority and make changes retrospectively in the refund and rate determinations for Southern Louisiana. The Commission expressly relied upon the Fifth Circuit's decision on rehearing in *Austral*, stating in Opinion 598, 46 FPC at 100:

> . . . In the opinion of March 19, 1970, the court [in *Austral*, 428 F.2d at 444-5] had said specifically:
>
> > The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here.
>
> In its order on the petition for rehearing [444 F.2d at 126-27] . . . the court went further:
>
> > . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under Section 19(b) of the Natural Gas Act, this Court has

> the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers, *we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.* [Emphasis added by Commission.]
>
> That language is authoritative, and we strive herein to follow it as the law of this case, and as sound in any event. [Footnote omitted]

The Commission in Opinion 598 further expressly stated the effect of that opinion in abrogating all refund provisions of the earlier Opinion 546, again relying on its authority under *Austral*, stating (46 FPC at 140):

> The Fifth Circuit recognized the Commission's power to review and revise refunds in these proceedings, indicating '. . . it may be that the refunds are too burdensome in light of new evidence to be in the public interest.' Moreover, the Natural Gas Act makes it explicitly clear that the Commission *may* order refunds. [Footnotes omitted]

The Commission thereupon set forth the applicable refund provisions for Southern Louisiana, which would apply retrospectively to all prior periods of time, in lieu of the provisions of Opinion 546.

Despite the Fifth Circuit's affirmance in *Placid* of the Commission's Opinion 598, which repudiated Opinion 546, the court below in its initial opinion directed that Opinion 546 be used as the basis for refunds by Petitioners.

While rehearing was pending before the court below, this Court announced its decision in *Mobil* affirming the Fifth Circuit in *Placid*. Nevertheless the court below re-

fused to modify its decision to obviate clear conflict with this Court and the Fifth Circuit, and continued to impute to Opinion 546 a finality and validity which it does not have under *Austral, Placid* and *Mobil, supra.* Thus, in its supplemental opinion on rehearing, the court below stated (App. C, *infra,* p. C18):

> In our previous opinion we disagreed with the Commission that the accompanying circumstances 'rendered Opinion No. 546 so tentative in character as to support the Commission's refusal in Opinion No. 565-A to employ the 18.5-cent just and reasonable rate as the initial price to be paid to the producers for gas delivered after the effective date of that rate.' On the same ground, we disagreed with the position that that rate could not serve as the predicate for refunds by the producers on account of deliveries before that date at higher prices. (Footnotes omitted)

The court then continued in its supplemental opinion to adhere to the use of Opinion 546 in spite of this Court's decision in *Mobil,* stating (App. C, *infra,* p. C21):

> We remain of the view, however, that with the still unrevised 18.5 cent [Opinion 546] just and reasonable area rate available, the Commission was legally obligated to give it preference.

The court below grossly misconceived the status of Opinion 546 when it referred to "the still unrevised 18.5 cent" area rate set forth therein, implying that that rate had force and effect at the time Opinion 565-A herein issued. The court's assumption that Opinion 546 had effect until July, 1971, when Opinion 598 issued, is totally inconsistent with the Commission's judicially sanctioned action and rationale in expressly repudiating Opinion 546 retrospectively. It necessarily follows that the court's position below is in direct conflict with *Placid* and *Mobil* affirming the Commission's retrospective abrogation of Opinion 546 for refund purposes.

Under the decision of the court below the four Petitioners would, as a consequence of only one sale in the Southern Louisiana area, be required to refund an estimated 70 million dollars. This is in stark contrast to a total refund obligation of only 150 million dollars for the entire producing industry attributable to all sales since 1954 in Southern Louisiana subject to refund in the area rate case. In the Southern Louisiana area rate case, the abrogation and withdrawal of Opinion 546 by Opinion 598 reduced industry-wide refund obligations from an estimated 375 million dollars to 150 million dollars. By its misplaced reliance upon Opinion 546, the court below increased the four Petitioners' refunds by an estimated 26 million dollars.[22] The conflicting application of Opinion 546 for refund purposes by the court below impugns the Commission's authority under *Placid* and *Mobil* to change its Southern Louisiana rate and refund determinations. The decision below would emasculate the broad authority of the Commission under *Austral, Placid* and *Mobil* to reopen and modify retrospectively any of its orders.

The erroneous application of Opinion 546 by the court below also imposes upon Petitioners exceptionally discriminatory adverse treatment when compared with the producing industry as a whole. This discriminatory treatment

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[22] Under Opinion 598 rate levels, refunds were required for the period prior to January 1, 1965, on amounts in excess of 20.625¢/Mcf; and for the period from January 1, 1965, to October 1, 1968, at 21.25¢/Mcf; thereafter, until January 1, 1971, refunds were required on the basis of 30.5% of excess revenues as defined in Opinion 598 (46 FPC 86 at 140). From January 1, 1971, until August 1, 1971, the effective date of Opinion 598, refunds were based entirely on the Opinion 598 levels, which prescribed 22.375¢/Mcf for onshore Louisiana sales.

is sufficiently grave to deprive Petitioners of substantive due process of law.

To resolve the conflict between the decision of the court below and those of the Fifth Circuit in *Austral* and *Placid* and this Court in *Mobil,* the writ for certiorari should be granted.

2. The Commission's Authority To Extend Payment For The Life Of The Reserves

Section 7(e) of the Natural Gas Act (p. 3, *supra*) empowers the Commission to issue certificates of public convenience and necessity subject to "such reasonable terms and conditions as the public convenience and necessity may require." In the exercise of an administrative agency's certificating function, it "has been entrusted with a wide range of discretionary authority," *United States* v. *Detroit & C. Nav. Co.,* 326 U.S. 236, 241 (1945); *accord, Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 7-8 (1961). Finding that the lease sale agreement in this case could not be unconditionally certificated in the public interest, the Commission issued conditioned certificates to Petitioners which substantially modified the lease sale agreement with the intention of making it more comparable to a conventional sale of gas.[23]

While deferring in principle to the Commission's restructuring of the lease sale agreement by conventionalizing certificate conditions (App. A, *infra,* pp. A32-A48), the court below set aside the fundamental life-of-reserves certificate condition imposed by the Commission for the expressed purpose of bringing the conventionalized arrangement

[23] Under a conventional sale, a producer sells gas as produced on a cents-per-Mcf basis for a term of years or for the life of the lease. Here the leases are sold for life, necessarily fixing that term.

"closer to a conventional sale" (App. G, *infra,* p. G4). This condition provides that Petitioners will be paid on a cents-per-Mcf basis for all gas produced by Texas Eastern during the life of the transferred leases, just as they would have been under a conventional sale of gas. The court below held that the life-of-reserves condition runs afoul of this Court's *Mobile-Sierra* rule[24] (App. A, *infra,* p. A64), which provides that the rate change provisions of the Natural Gas Act, 15 U.S.C. 717 *et seq.,* and the Federal Power Act, 16 U.S.C. 791a, *et seq.,* do not give natural gas companies or electric utilities the right to increase contract rates by unilateral filings, absent a Commission determination that the contract rate is so low as to conflict with the public interest, *United Gas Pipe Line Co.* v. *Mobile Gas Servicing Corp.,* 350 U.S. 332, 345 (1956).[25]

The Court below was of the erroneous view that this Court's Catco decision[26] established that "the *Mobile-Sierra* rule applies full force to Section 7 proceedings" (App. A, *infra,* p. A67). This is not apparent from a reading of Catco. The Court's reference in Catco to its *Mobile* decision obviously related to the circumstances then before it, *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 391-92 (1959). It is not reasonable to assume that the Court intended to preclude the Commission from exercising its broad conditioning power in the public interest to modify an unsual sales transaction to make it conform to a conventional sale of gas.

[24] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *Federal Power Commission* v. *Sierra Pacific Power Company,* 350 U.S. 348 (1956).

[25] The court below proceeded on the premise that the life-of-reserves certificate condition may increase the $134,395,700 price contained in the unconventionalized lease sale agreement (App. A, *infra,* pp. A64-A66). This premise is not presently susceptible to proof.

[26] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

Unlike Catco, the Commission did exercise its certificate conditioning power in the case-at-bar to equate Petitioners' lease sale agreement to a conventional sale of gas. The Commission concluded that unless Petitioners were allowed to receive payment for the gas produced over the life of the transferred leases, Petitioners would be deprived of an essential feature of a conventional sale (App. G, *infra*, pp. G4, G10-G11).

The Commission supported its modified conventionalization with two undisputed reasons: (1) receipt of the $134 million set forth in the unconventionalized lease sale agreement would be of substantially less value to Petitioners because it would be received over a much longer period than contemplated by that agreement and (2) limiting Petitioners to the $134 million would deprive them of the benefit, inherent in a conventional sale for life-of-reserves, of receiving payment for the gas produced over the life of the dedicated leases (*id.* at G10-G11).

In setting aside the life-of-reserves condition, the court below erroneously held that the Commission had not found such condition to be "essential to conventionalization of the lease sale arrangement" (App. A, *infra*, pp. A68-A69). Indeed, the Commission expressly so found (App. G, *infra*, p. G4). The Commission's life-of-reserves condition is soundly based upon fact and reason and is not in conflict with the Court's Catco decision, *supra* at 391.[27] In Opinion No. 565, the Commission literally mandated the lease sale agreement out of existence by conventionalizing conditions. Thereafter in Opinion No. 565-A, it modified its initial prescription by imposing the life-of-reserves condition in order to reach a more equitable result consonant with its objective of conventionalization. In so doing, the Commission acted properly within its exclusive province as arbiter of the public convenience and necessity.

[27] As the Court stated (360 U.S. at 391): ". . . The Congress, in § 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require."

The reliance of the court below upon this Court's *Mobile-Sierra* rule[28] as the basis for setting aside the certificate condition in question is misplaced, as indicated above. In lieu of the Commission's life-of-reserves condition, however, the court below has substituted its own condition in recognition of Petitioners' "plight" as a result of the conventionalization prescribed by Opinion No. 565 (App. A, *infra*, pp. A69-A71). Thus, it has directed the Commission to increase Texas Eastern's payments "beyond the aggregate $134 million contract price by an amount equal to the time value of the money to be paid on the Commission-rearranged payment schedule" (*id.* at A71).[29] Characterizing its own condition as "the only alternative legally available to the Commission," the court below has incorporated it as an integral part of its judgment (*ibid.*).

[28] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*; *Federal Power Commission* v. *Sierra Pacific Power Company*, *supra*.

[29] There is no way to determine from the administrative record below, closed in 1968, whether this court-mandated condition, the Commission's life-of-reserves condition, or the lease sale unconditionally certificated, would be more in the public interest. By this assignment of error, Petitioners do not imply the acceptability to them of the Commission's life-of-reserves condition. It may be less harmful to them than the court-fashioned substitute but they continue to contend that the unconditioned lease sale best serves the public interest, and is the only form acceptable to them as a basis for implementing their conditional unilateral proposal to reimburse Texas Eastern for a short fall of reserves. The court below erroneously assumed this proposal to be a bilateral agreement with Texas Eastern (App. A, *infra*, p. A15, n.40; See *contra*, *id.* at pp. A109-A110, n.540).

The substitution of the court-fashioned condition constitutes an impermissible intrusion upon the Commission's province and the exercise of "an essentially administrative function," *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 21 (1952) *National Labor Relations Board* v. *Food Store Employees Union*, 417 U.S. 1 (1974). On remand the Commission needs a free hand to examine eight years of intervening facts, to determine what conditions, if any, are now justified. It may well agree with Petitioners, and two of the five Commissioners dissenting in Opinion No. 565-A, that the lease sale agreement should be certificated without conditions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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